

Hon. James L. Robart

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

WIZARDS OF THE COAST LLC,

Plaintiff,

v.

CRYPTOZOIC ENTERTAINMENT, LLC,  
and HEX ENTERTAINMENT, LLC,

Defendants.

Civil Action No. 2:14-cv-00719JLR

OPPOSITION TO MOTION FOR  
EXTENSION OF TIME

The Defendants characterize the present motion as being necessary because they asked for a 21 day extension that Plaintiff WOTC refused, but that account is inaccurate and masks the actual issue in dispute. In fact, WOTC plainly stated that the Defendants could have the very same 21 day extension they now seek from the Court. The Defendants—not WOTC—rejected that proposal because WOTC explained that it required actual document production by the deadline, not a “response” that merely promises production later. Lorbiecki Decl., p ¶ 8, Exhibit B. The Defendants refused and would not commit to *any* deadline for the actual production of the requested documents. They now ask the Court for an extension of time to “respond” to the

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WZRD-6-0001 P25 RESP re Mot Extend Discovery.docxLOWE GRAHAM JONES PLLC  
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1 request for documents, but without having any actual obligation to “produce” the requested  
2 documents. Lorbiecki Decl., p ¶ 12

### 3 **Background Facts**

4 The recitation of events in the Defendants’ motion is surprisingly selective and omits  
5 several pertinent details. The Defendants correctly state that certain discovery requests were  
6 served on each party and that WOTC asked for a one-week extension making its responses due  
7 on October 29. The Defendants then tersely state that “the parties discussed settlement,” those  
8 discussions terminated, and WOTC’s responses are now overdue and “in default.” The  
9 Defendants do not explain that WOTC’s responses were not served on October 29 because the  
10 Defendants proposed a standstill in order to explore settlement. Lorbiecki Decl., p ¶¶ 6, 7. When  
11 the settlement effort failed, WOTC proposed new dates for each side to serve responses to their  
12 outstanding discovery requests. WOTC has also served responses to the Defendants’ requests,  
13 including the production of about 15,000 pages. Lorbiecki Decl., p ¶ 4.

15 The Defendants accurately capture the initial proposals for extensions of time in which  
16 WOTC would respond by November 12 and the defendants would respond by November 21.  
17 The Defendants asked for a greater amount of time, through December 1, and they describe  
18 WOTC’s response as simply “Plaintiff’s counsel would not agree.” Dkt. 30, at p. 3, line 7. To the  
19 contrary, WOTC expressly agreed to the December 1 extension in an email on November 10  
20 stating: “You have proposed that we grant you an extension until December 1, I am willing on  
21 one condition, that December 1 means the production of documents, not merely the promise of  
22 production at a later time that is mutually acceptable.” Lorbiecki Decl., p ¶ 8. The Defendants’  
23 motion cryptically refers to a “condition” without explaining that the apparently unreasonable  
24 condition was that the Defendants must actually produce their documents on the deadline, rather  
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1 than serving an empty written response that promises to produce documents at some unspecified  
2 later date.

3 The most the Defendants would promise was that by December 1 they would produce  
4 “the documents we have collected, reviewed for responsiveness and privilege, and appropriately  
5 marked by December 1, and the others will be provided on a rolling basis as soon as possible  
6 after that.” Of course, this hollow promise does not even commit the Defendants to produce even  
7 one page by December 1, and it has an open-ended deadline for completion of the requested  
8 production. The Defendants further omit that WOTC asked the Defendants to specify a date they  
9 could commit to, if December 1 was not acceptable. Tellingly, the Defendants would not answer  
10 this question at all. Instead, they insisted on a so-called “unconditional” extension to  
11 December 1, in which the “unconditional” qualifier meant that they would not actually have to  
12 produce anything by that date.  
13

#### 14 **WOTC Agrees to the December 1 Extension to Produce Documents**

15 As outlined above, WOTC agrees with the requested extension to produce documents by  
16 December 1. In fact, WOTC said as much, in writing, to the Defendants before they filed the  
17 present motion. WOTC reiterates here that a December 1 deadline is acceptable if it means the  
18 Defendants will substantially produce the requested documents.  
19

#### 20 **The Defendants should not be Permitted Open-ended Rolling Discovery**

21 The present motion has nothing at all to do with any alleged refusal to agree to a  
22 December 1 deadline. As noted above, WOTC expressly agreed to it. Moreover, WOTC offered  
23 to grant the Defendants a reasonable amount of time beyond that date if they could justify it and  
24 would agree to a specific date by which they would actually produce all or a substantial majority  
25 of the requested documents. The Defendants’ position was that neither December 1 nor any other  
26

1 date was acceptable because they want to make a “rolling” production instead—with no promise  
 2 regarding when the rolling production might begin or end. This true nature of the dispute is not  
 3 articulated in the Defendants’ briefing, but it is clear from the correspondence of counsel that  
 4 was omitted from their briefing.

5       There may be instances in which the volume of document production and the number of  
 6 custodians for requested records are so many and so widely spread that it is too challenging to  
 7 collect the majority of them within the 30 days allotted by the Civil Rules. In such cases, some  
 8 form of rolling production may be appropriate in order to allocate resources efficiently and in an  
 9 orderly way. Even then, however, a rolling production should have a specific plan and specific  
 10 deadlines to substantially accomplish the production. It should never be hazy and open-ended,  
 11 because (1) the requesting party cannot take depositions until it is complete, (2) the producing  
 12 party has no obligation to finish it until the close of discovery, thereby preventing meaningful  
 13 analysis, dispositive motions, and settlement, and (3) it leads to acrimonious attorney interaction  
 14 and inevitable motion practice regarding the completion of discovery. *E.g., Whetstone*  
 15 *Electronics v. Xerox*, 6:10cv278 (April 7, 2011) (“The Court notes a trend in complex patent  
 16 cases where the parties undertake “rolling” productions of documents and in many cases the  
 17 most relevant documents are produced near the discovery deadline invariably leading to  
 18 acrimonious motion practice”); *Bullion Monarch Mining, Inc. v. Newmont USA, Limited*, 271  
 19 F.R.D. 643 (NV DC, 2010) (“Here, Newmont’s gross untimeliness in production completely  
 20 nullifies Bullion’s ability to meaningfully engage in that inquiry.”). Because of these issues, the  
 21 Defendants should be required to complete their production on a specific date. *See, e.g., Tierno*  
 22 *v. Rite Aid Corp.*, No. C 05-02520 TEH, 2008 WL 3287035, at \*4 (N.D. Cal. July 31, 2008).  
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1 The Defendants should not be allowed open-ended rolling discovery in this case. The  
2 Defendants are companies with many fewer employees generating documents; they have no need  
3 to spread the document production over time. Hex Entertainment LLC has only existed since  
4 April of 2013. They have had little time to develop a huge collection of documents. Indeed, in  
5 the course of the communications leading up to the present motion the Defendants *never*  
6 explained any need for rolling production and instead simply declared that they would do it. For  
7 that matter, the Defendants never explained any need for time beyond December 1, despite  
8 WOTC's direct question asking the Defendants to simply state how much time they would need  
9 (and justify it) if they needed more time. Under the circumstances, any rolling discovery will  
10 simply drag things out, backload depositions and discovery to the eve of the discovery cutoff,  
11 and cause unnecessary back-and-forth or motion practice regarding whether and when the  
12 Defendants might finish producing the requested documents. As such, the Court should grant the  
13 order as requested by the Defendants, but modified to clarify that the Defendants must  
14 substantially *produce* the requested documents by that date.  
15

#### 16 **The Accusations of Litigation Abuses are Unfounded**

17 The Defendants conclude their motion with a battery of unsupported and improper  
18 accusations regarding litigation abuses. Though WOTC is surely larger than the Defendants,  
19 there are no facts that indicate the Defendants are unable to pay for an adequate defense. On this  
20 point, the Defendants assert that there is an "extreme difference in ability to finance a litigation"  
21 in an apparent effort to suggest that WOTC is taking advantage of that difference. Without any  
22 evidence or substance behind the implication, the Defendants should refrain from making it.  
23

24 The Defendants next assert that WOTC's counsel has been uncooperative in this  
25 litigation, taking positions that make it expensive. Beyond this bald statement, the Defendants  
26

1 offer nothing more. Again, this allegation is incorrect, improper, and should not be asserted so  
2 cavalierly.

3 Still further, the Defendants complain about interaction related to an earlier request for  
4 more time to answer the Complaint. In raising this stale issue, the Defendants omit  
5 correspondence between counsel regarding whether attorney Dudkowski could handle the  
6 answer in attorney Meiklejohn's absence, since both had entered an appearance. Attorney  
7 Meiklejohn never answered WOTC's inquiry regarding whether he personally needed to be  
8 involved, and instead he simply filed his motion for more time. After seeing the motion for more  
9 time, WOTC reconsidered the matter and agreed to the requested extension. There is nothing in  
10 this exchange that amounts to misconduct as the Defendants assert.  
11

12 Finally, the present motion has no foundation in any desire to increase the Defendants'  
13 costs. Again, WOTC specifically agreed to the very extension the Defendants asked for, and  
14 even offered more time if it was necessary. Despite that agreement, the Defendants chose to file  
15 the present motion seeking an order giving them until December 1. What they never explain to  
16 the Court is that they really want an extension allowing them to "respond" to the discovery  
17 requests by December 1. What they do not want is an extension requiring them to actually  
18 "produce" the requested documents by December 1. The Defendants should have made this issue  
19 clear in their motion from the beginning. In addition, if they genuinely needed more time they  
20 should have first answered WOTC's direct question asking them to specify how much time they  
21 need to actually produce the documents if December 1 was too soon. They refused to answer that  
22 question, then they filed this motion without explaining to the Court the true nature of the debate.  
23 It was the conduct of the Defendants, not WOTC, that burdened the Court with this issue and  
24 caused needless motion practice expense. In addition, it makes it quite clear that in the absence  
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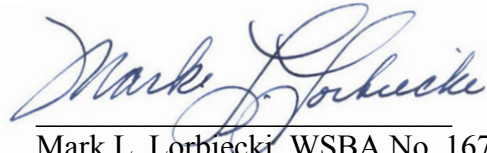
  
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1 of specific deadlines to produce, rather than hazy deadlines to “respond,” there will be more  
2 motions to follow.

3 **CONCLUSION**

4 The Court should grant the Defendants’ motion for an extension of time, except that it  
5 should specify that the Defendants may have until December 1 to substantially “produce” the  
6 requested documents instead of an extension until December 1 to merely “respond” without the  
7 accompanying production.  
8

9 RESPECTFULLY SUBMITTED this 19th day of November, 2014.

10 

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CERTIFICATE OF SERVICE


I, Jean M. Larsen, hereby certify that I am an employee of Lowe Graham Jones PLLC and that on November 19, 2014 I electronically filed the foregoing **OPPOSITION TO MOTION FOR EXTENSION OF TIME** with the **DECLARATION OF MARK L. LORBIECKI** and this **CERTIFICATE OF SERVICE** with the Clerk of the Court using the CM/ECF system, which upon information and believe will send notification of such filing to the following attorneys of record:

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